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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 74-8

J. B. O'CONNOR, M.D., *Petitioner,*

v.

KENNETH DONALDSON, *Respondent.*

Brief of American Psychiatric Association as Amicus Curiae in Support of the Grant of Certiorari

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INTEREST OF AMICUS CURIAE

The American Psychiatric Association (A.P.A.), founded in 1844, is the nation's largest organization of qualified doctors of medicine who specialize in psychiatry. Almost 20,000 of the nation's approximately 25,000 psychiatrists are members of the Association. The A.P.A. has participated as an *amicus curiae* numerous times in cases throughout the country involving mental health issues.

Amicus believes this case to be of historic importance to the future of mental health care in the nation's public mental institutions. The landmark ruling below that there is a constitutional right to treatment, and the difficult question of how to enforce that right, are of immense concern to members of the A.P.A. and to their patients. A grant of certiorari here is essential in order to clarify presently conflicting interpretations of the rights and duties of mental patients and their psychiatrists.

CONSENT OF THE PARTIES

Amicus is filing this Brief with the consent of both parties, whose letters of consent have been filed with the Clerk.

ARGUMENT

The opinion below decides two questions that are fundamental to the future course of mental health care in this country. First, does the involuntarily committed patient at a state mental institution have a constitutional right to a level of treatment reasonably calculated to improve his or her mental condition? Second, assuming there is such a right, who should be responsible for providing the remedy when an institution has inadequate resources to provide that level of treatment?

The court below answered the first question by holding that there *is* a constitutional right to an adequate level of treatment, and that Respondent Kenneth Donaldson did not receive this minimum level of care. Amicus A.P.A. wholeheartedly supports the Court of Appeals decision on this issue. Indeed, as we will discuss in Part I, below, Amicus believes that the importance of this principle and the conflicts between the

states as to its enforcement require a grant of certiorari here. An affirmance of the decision below on this point could provide invaluable guidance to the lower courts and to responsible state agencies by clarifying the contours of this new right to treatment.

Regarding the second major question—the proper remedy for violation of this new right—Amicus believes the court below committed a serious error. As we will discuss in Part II, below, the Court of Appeals has held that the psychiatrist who chooses to work for a woefully understaffed state mental institution can be held *personally* liable when a patient receives insufficient treatment, even though the institution has such inadequate resources that it would be impossible for its doctors to provide adequate care to all their patients. This ruling conflicts with numerous decisions from other courts holding that state officials are not liable personally for damages when in good faith they have been unable to comply with a newly declared constitutional right. Moreover, holding the doctor rather than the institution liable for damages will almost certainly deter psychiatrists from working at the institutions where they are most needed—those where the current level of treatment is the most inadequate. This Court should grant certiorari so that this ruling does not negate much of the potential for good inherent in the lower court's holding on the right-to-treatment issue.

I. THIS COURT SHOULD GRANT CERTIORARI HERE TO AFFIRM THE CONSTITUTIONAL RIGHT TO TREATMENT.

The present case starkly reveals the overwhelming shame and challenge of this nation's mental health care system. The deplorable conditions shown to exist at Florida State Hospital at Chattahoochee ("Chatta-

hoochee") are all too common in many jurisdictions throughout the country. Legislatures and officials in numerous states routinely deny mental hospitals the resources needed to treat their involuntarily committed residents like patients, rather than like prisoners. This Court should grant certiorari so that all such institutions (and the legislatures that support them) will understand their legal duties and begin providing at least the basic minimum level of care that the Fifth Circuit has recognized is a constitutional requirement.

During Mr. Donaldson's fourteen-year confinement, the ratio of patients per staff psychiatrist ranged from 560-1 all the way up to 1000-1. Petition for Certiorari, at 6. After performing other medical and administrative duties, the average hospital staff psychiatrist is able to devote only 47% of his or her time to direct patient care.[1] Thus, if each doctor spent an equal amount of time with each patient, as little as one or two minutes per week would have been available for psychiatric "treatment" of each patient at Chattahoochee. Meaningful psychiatric care was not, and cannot be, provided under such circumstances.

The American Psychiatric Association has promulgated standards for the minimum level of staffing necessary for a public mental hospital to provide even the lowest level of acceptable care.[2] These are truly *minimum* standards, since they "represent a compromise between what was thought to be adequate and what it was thought had some possibility of being realized."

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[1] Joint Information Service, American Psychiatric Ass'n & Nat'l Ass'n for Mental Health, Eleven Indices 14 (1971).

[2] American Psychiatric Association, Standards for Hospitals and Clinics 61 (rev. ed. 1958).

Solomon, *The American Psychiatric Association in Relation to American Psychiatry,* 115 AM. J. PSYCHIAT. 1, 7 (1958). Yet even these minimal standards, which have been accepted as guideposts by the courts, *see Rouse* v. *Cameron,* 373 F.2d 451, 457-58 & n.33 (D.C. Cir. 1966); *see also Wyatt* v. *Stickney,* 344 F. Supp. 373, 383 (M.D. Ala. 1972), *appeal docketed sub nom. Wyatt* v. *Aderholt,* No. 72-2634 (5th Cir., Aug. 1, 1972), demonstrate that Chattahoochee needed a vastly larger number of doctors than it actually had in order to provide adequate treatment to its resident population. The A.P.A. standards allow no more than thirty acutely ill patients, or 150 chronically ill patients, per full-time psychiatrist. Thus, while each psychiatrist at Chattahoochee averaged 750 patients, of whom 350 were acutely ill,[3] minimum staffing standards demanded *sixteen* full-time psychiatrists in order to treat those patients.

The necessity for a grant of certiorari here to affirm mental patients' constitutional right to treatment arises from the fact that state mental hospital overcrowding and understaffing are common today far beyond the confines of Chattahoochee or the Fifth Circuit. "In many of our hospitals about the best that can be done is to give a physical examination and make a mental note on each patient once a year, and often there is not even enough staff to do this much." Solomon, *The American Psychiatric Association in Relation to American Psychiatry,* 115 AM. J. PSYCHIAT. 1, 7 (1958). A comprehensive report in the early 1960's suggested that no public mental hospital in the United States met

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[3] These figures are roughly the midpoints of the data range during the fourteen-year period for each category. *See* Petition for Certiorari, at 6-7.

minimum staffing requirements. U. S. SURGEON GENERAL'S AD HOC COMM. ON PLANNING FOR MENTAL HEALTH FACILITIES, PLANNING OF FACILITIES FOR MENTAL HEALTH SERVICES 39 (1961). Although there has been considerable improvement in recent years,[4] current studies continue to reveal many large mental hospitals with patient-doctor ratios of 500-1 and even higher.[5]

When institutional resources are so low, hospitals become indistinguishable from prisons. Patient "care" is little more than custody, and the treatment rationale for involuntary commitment becomes a cruel hoax. Like Kenneth Donaldson, there are many thousands of people throughout the country who, although suffering from serious mental illness, have committed no crimes and shown no obvious signs of dangerousness to others, *see* 493 F.2d at 517, but whom society has forced into mental institutions to receive treatment for their own

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[4] *See* NAT'L INST. MENTAL HEALTH, STAFFING OF MENTAL HEALTH FACILITIES, UNITED STATES, 1972, at 7-9 (DHEW Pub. No. ADM 74-28, 1974).

[5] While the nationwide average patient-psychiatrist ratio in state mental hospitals is now down to approximately 70-1, *county* mental hospitals still average 500 patients per psychiatrist. *Id.* at 53. The range between the highest and lowest statewide patient-psychiatrist ratio (counting all of each state's public mental hospitals) is a staggering 14,300%, the worst state having 143 times more patients per doctor than the best state. *Compare* NAT'L INST. MENTAL HEALTH, STATISTICAL NOTE 109, STAFFING OF STATE AND COUNTY HOSPITALS, UNITED STATES, 1973, at Table 1 (Aug., 1974) (Alabama), *with id.* at Table 1 (Colorado). Reports of individual mental hospitals with a thousand or more patients per psychiatrist are "well known." *Hearings on the Constitutional Rights of the Mentally Ill Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judic.*, 91st Cong., 1st & 2d Sess. 30, 51 (1969-70).

good. This *"parens patriae"* rationale rings hollow, indeed, when "treatment" turns into neglect.

The court below was the first federal court of appeals to rule that involuntarily committed mental patients have a constitutional right to treatment. *See* 493 F.2d at 519 & n.9. A few courts have rejected the existence of such a right. *See, e.g., People ex rel. Anonymous* v. *La Burt,* 14 App. Div. 2d 560, 218 N.Y.S. 2d 738 (1961), *appeal dismissed and cert. denied,* 369 U.S. 428 (1962). More commonly, however, state officials simply assume that no such right exists when they make their staffing and resource decisions, and mental patients fail to bring any judicial action to challenge those decisions. This Court has already noted how infrequently mental patients litigate the states' powers in this area. *Jackson* v. *Indiana,* 406 U.S. 715, 737 (1972). Thus, because of the condition of the people whose rights are affected, conflicts between different states' policies and constitutional interpretations regarding the right to treatment do not necessarily result in a conflict between circuit court decisions. Nevertheless, the conflict is very real and very crucial to the citizens in many jurisdictions outside the Fifth Circuit who are being confined without constitutionally adequate treatment.

This Court should grant certiorari to resolve those conflicting state practices by affirming that there is a constitutional right to treatment.

II. THE LOWER COURT'S STANDARD FOR PERSONAL LIABILITY CONFLICTS WITH THE PRINCIPLE OF PIERSON v. RAY AND WILL HAMPER ENFORCEMENT OF PATIENTS' RIGHT TO TREATMENT.

After concluding that there is a constitutional right to treatment, the Court of Appeals faced the equally important issue of determining the appropriate remedy

for violation of that right. On this issue Amicus believes the lower court seriously erred. The record shows that at Chattahoochee there were so few doctors that it was impossible for them to provide adequate treatment to all their patients. *See* pp. 4-5, *supra.* Yet, the court held that those doctors who stay at the institution and try to treat the huge number of patients there can be liable *personally* for any damages the patients suffer from lack of treatment. This ruling is fundamentally unfair to the doctors and is contrary to the patients' interest in obtaining more medical treatment.

At least prior to this case, the law was well settled that a state official should not be held personally liable for a civil rights violation when he or she had tried in good faith to follow then-existing constitutional principles, even if those principles later were overturned. As this Court held in *Pierson* v. *Ray,* 386 U.S. 547, 557 (1967), state officers are not "charged with predicting the future course of constitutional law." They "neither can nor should be expected to be seers in the crystal ball of constitutional doctrine." *Westberry* v. *Fisher,* 309 F. Supp. 12, 17 (D. Me. 1970).

In the instant case, a constitutional right to treatment was little more than a gleam in the eye of its most ardent proponent during Mr. Donaldson's confinement, which began in 1957. The article generally credited as the first even to suggest such a right appeared in 1960. Birnbaum, *The Right to Treatment,* 46 A.B.A.J. 499 (1960); *see* 493 F.2d at 519-20 & nn.12, 14. Several courts during the 1960's refused to recognize the existence of a constitutional right to treatment. *See, e.g., People ex rel. Anonymous* v. *La Burt,* 14 App. Div. 2d 560, 218 N.Y.S.2d 728 (1961), *appeal*

dismissed and cert. denied, 369 U.S. 428 (1962). Indeed, Mr. Donaldson himself brought several earlier right-to-treatment claims against Dr. O'Connor, and the courts consistently rejected these claims. *See, e.g., Donaldson* v. *O'Connor,* 234 So. 2d 114 (Fla. 1969), *cert. denied,* 400 U.S. 869 (1970). *See also Donaldson* v. *O'Connor,* 390 U.S. 971 (1968); *Donaldson* v. *Florida,* 371 U.S. 806 (1962); *In re Donaldson,* 364 U.S. 808 (1960). It was not until 1971, the year of Mr. Donaldson's release from Chattahoochee, that the first court held that there should be a constitutional right to treatment. *Wyatt* v. *Stickney,* 325 F.Supp. 781 (M.D. Ala. 1971), *appeal docketed sub nom. Wyatt* v. *Aderholt,* No. 72-2634 (5th Cir., Aug. 1, 1972).

Under these circumstances it is unfair and contrary to the principle this Court stated in *Pierson* v. *Ray* to apply the right-to-treatment principle retroactively by holding Dr. O'Connor personally liable for damages. Other Circuits have recognized the necessity of "providing conscientious state officials with some protection against the cutting edge of a rapidly developing legal doctrine." *Eslinger* v. *Thomas,* 476 F.2d 225, 229 (4th Cir. 1973). In *Eslinger,* plaintiff challenged the policy of the clerk of the South Carolina State Senate that women were ineligible to serve as senate pages. The Fourth Circuit held that injunctive relief was proper, since the discriminatory policy ran afoul of current constitutional requirements of equal protection. The court went on, however, to reverse the lower court's ruling that the clerk should be liable for damages. The court noted that the defendant's actions had taken place at a time when the law generally tolerated sex-based classifications. *Id.* at 230 & n.5. "Although the clerk may have acted with little sensitivity . . . he

acted in the light of a long-standing, albeit vaguely defined, 'custom' .... He did no more, or less, than what had always been done." *Id.* at 229. The Fourth Circuit concluded that the defendant should not be liable for failing to foresee a new constitutional principle. *Id.; accord, e.g., Skinner* v. *Spellman,* 480 F.2d 539 (4th Cir. 1973) (no damages against official acting in "reasonable good faith reliance on what was standard operating procedure"); *Clarke* v. *Cady,* 358 F. Supp. 1156, 1163 (W.D. Wisc. 1973) (prison warden "immune from damages under § 1983 when he reasonably relies upon the validity of a prison practice which has only subsequently been determined to be unconstitutional"); *Collins* v. *Schoonfield,* 363 F. Supp. 1152, 1156 (D. Md. 1973) ("it would contravene basic notions of fundamental fairness if prison officials were held to be liable monetarily for acts which they could not reasonably have known were unlawful").

In the instant case, even if Dr. O'Connor had possessed the prescience to recognize Mr. Donaldson's constitutional right to adequate treatment, Amicus fails to see how Dr. O'Connor could have responded in a way that would have satisfied the court below. Petitioner had as many as *sixteen times* more patients than it was possible to treat properly under accepted professional standards. *See* pp. 4-5, *supra.* Moreover, Mr. Donaldson himself rejected for religious reasons [6] the medication therapy which is generally recognized as one of the most effective forms of treatment for his

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[6] *See Winters* v. *Miller,* 446 F.2d 65 (2d Cir.), *cert. denied,* 404 U.S. 985 (1971) (involuntarily committed Christian Scientist has right to refuse medication treatment). *See also Developments in the Law—Civil Commitment of the Mentally Ill,* 87 HARV. L. REV. 1190, 1350 (1974).

condition.[7] Thus, the staff time and resources needed for adequate treatment of Mr. Donaldson simply were not available at Chattahoochee.

It is no answer to say, as did the Court of Appeals, that Dr. O'Connor should be personally liable because he did not devote as much time to Mr. Donaldson as did Dr. Hanenson, another one of Mr. Donaldson's attending physicians. *See* 493 F.2d at 518.[8] When only one or two minutes per week is available to "treat" each patient, see p. 4, *supra,* a doctor must either devote insufficient time to all patients, or give extra time to some at the expense of many others. The record shows that Dr. Hanenson decided to give a disproportionately large amount of his time to Mr. Donaldson—more time than any doctor at Chattahoochee possibly could devote to each of the 560-1000 persons for whom he or she was responsible. Under the Court of Appeals ruling, however, the extra attention a doctor gives to one patient can become the standard which every doctor in that institution must meet for every patient. Inevitably, to comply with such a rule doctors must provide identical amounts of time to each patient, regardless of levels of need. This "lowest common denominator" approach substitutes a mathematical rule for medical judgment. It ignores the harsh reality that even the sharpest knife cannot cut a small pie into enough

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[7] *See, e.g.,* Hollister, *Choice of Antipsychotic Drugs,* 127 AM. J. PSYCHIAT. 186, 188 (1970); VETERANS ADMINISTRATION, ANTIPSYCHOTIC, ANTIANXIETY & ANTIDEPRESSANT DRUGS 3 (MB-11, Sept. 15, 1966).

[8] Although the lower court paid lip service to the propriety of allowing doctors a "good faith" defense in cases of this kind, *see* 493 F.2d at 527, it effectively eliminated such a defense by ignoring the evidence that insufficient resources at Chattahoochee made adequate treatment impossible. *See* pp. 4-5, *supra.*

servings to sustain 1000 starving people. The fact is that no matter how each doctor at Chattahoochee chose to divide it, his total time for patient care was just too small to go around.

It is an unspeakable tragedy when a mentally ill person is crowded into a facility like Chattahoochee, given little or no medical treatment, and allowed to remain there for years on end. Amicus believes strongly that such conditions violate the patient's constitutional right to treatment. The responsibility for a remedy, however, must lie with those who have the power to correct these conditions.[9]

The courts can find effective remedies for these problems by focusing on the institutional setting and resources available for treatment. In *Wyatt* v. *Stickney,* 325 F. Supp. 781 (M.D. Ala. 1971), *on submission of proposed standards,* 334 F. Supp. 1341, *enforced,* 344 F. Supp. 373, *appeal docketed sub nom. Wyatt* v. *Aderholt,* No. 72-2634 (5th Cir., Aug. 1, 1972), the court has used its equitable power to require state institutions to increase their staff-patient ratio to the level necessary to provide adequate care. *See* 344 F. Supp. at 387. The American Psychiatric Association is participating in the *Wyatt* case, supporting the right to treatment and urging the court to order a variety of needed institutional reforms. *See* Motion of

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[9] Supporters of the right to treatment generally recognize that the understaffing and lack of physical facilities that plague our state mental institutions are not the fault of the psychiatrists or others who work there. "Our society should be grateful to, rather than adversely critical of, the personnel who continue to work in these institutions under the present trying conditions." Birnbaum, *The Right to Treatment,* 46 A.B.A.J. 499, 500 (1960); *accord, e.g.,* Birnbaum, *Some Remarks on the Right to Treatment,* 23 ALA. L. REV. 623, 628 (1971).

American Psychiatric Association for Leave to Participate as *Amicus Curiae*, *Wyatt* v. *Aderholt*, No. 72-2634 (5th Cir., filed Dec. 4, 1972). The other right-to-treatment cases relied upon by the court below similarly focus on institutional reforms and injunctive relief. *See Welsch* v. *Likins*, 373 F. Supp. 487 (D. Minn. 1974); *Stachulak* v. *Coughlin*, 364 F. Supp. 686 (N.D. Ill. 1973). *See also Rouse* v. *Cameron*, 373 F.2d 451, 458-59 (D.C. Cir. 1966) (institution must release patient receiving inadequate treatment). When a state institution fails to meet these minimum standards identified by the courts, a damage action should lie *against the responsible state agency.*[10] *See Whitree* v. *State*, 56 Misc. 2d 693, 290 N.Y.S. 2d 486 (Ct. Cl. 1968) ($300,000 award against state for improper custodial confinement of mental patient). Indeed, such actions may be the most effective method to loosen the legislatures' pursestrings, so that sufficient resources do become available. *See* 82 HARV. L. REV. 1771, 1776-77 (1969).

Instead of such institutional remedies, the Fifth Circuit has held that the doctor who works on the staff of an overcrowded hospital is personally liable for damages to patients he or she is unable to treat. This decision has frightening implications for the very patients whose right to treatment the court was seeking to protect. Unless this Court grants certiorari it would be foolish for qualified doctors to continue working at Chattahoochee or the many other institutions that are similarly understaffed. Rather than stay in a system where their best efforts could not eliminate constant exposure to large damage awards, doctors will seek posi-

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[10] The doctor should be personally liable, of course, if he commits any acts of malpractice. *See generally* Morse, *Tort Liability of the Psychiatrist*, 18 SYR. L. REV. 691 (1967).

tions in private practice, or at the better-staffed institutions. Rather than increasing the quality and quantity of treatment available at Chattahoochee, the decision below will lead to just the opposite result.

The Court of Appeals indicated in its opinion that the "core of the charge" against Dr. O'Connor was that he confined Mr. Donaldson "knowing that [he] was not receiving adequate treatment and knowing that absent such treatment the period of his hospitalization would be prolonged." 493 F.2d at 513. The tragic truth is that the grossly inadequate resources in our state mental hospitals today require many of our country's best psychiatrists in painful candor to confess their guilt to this same charge. The question this Court should review is whether our judicial system can help correct the institutional inadequacies that are depriving thousands of mental patients of their fundamental rights, or whether instead the judicial response will be to punish and drive away the people who are doing the most to deal with these problems.

CONCLUSION

For the foregoing reasons, Amicus respectfully urges this Court to grant a writ of certiorari.

Respectfully submitted,

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